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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

WAUKEEN MCCOY et al., Plaintiffs, Cross-defendants and Appellants, v. JEREMY CHARLES PACK, Defendant, Cross-complainant and Respondent.	A107323 (San Francisco County Super. Ct. No. 415383)

Waukeen McCoy individually and The Law Offices of Waukeen McCoy (hereafter McCoy) appeal an amended judgment awarding Jeremy Charles Pack (hereafter Pack) costs in the amount of $6,491.85 following judgment for the defendant on the complaint and cross-complaint. We affirm.

PROCEDURAL HISTORY

On December 5, 2002, McCoy filed a complaint against Pack seeking damages for defamation and other alleged torts. Pack countered by filing a cross-complaint alleging a series of causes of action including sexual discrimination. Following a jury trial, the jury entered a special verdict for defendant on the complaint and for cross-defendant on the cross-complaint.

Both parties filed memoranda of costs and moved to tax the other's claim of costs. The matter came up for a hearing on April 30, 2004. Following the hearing, the court entered a minute order on May 4, 2004, finding that Pack was the prevailing party and ordering him to submit an amended memorandum of costs. Pack filed a second memorandum of costs on May 10, 2004. After a further hearing, the court entered on

July 19, 2004, an amended judgment awarding Pack costs in the amount of $6,491.85. McCoy filed a timely notice of appeal.

A. Prevailing Party

Under Code of Civil Procedure section 1032, subdivision (b), a prevailing party "is entitled as a matter of right to recover costs in any action or proceeding." Subdivision (a)(4), of this section defines the term prevailing party to include "a defendant where neither plaintiff nor defendant obtains any relief."

On facts identical to those of the present case, the court in *McLarand, Vasquez & Partners, Inc. v. Downey Savings & Loan Assn.* (1991) 231 Cal.App.3d 1450 held that a defendant is the prevailing party when the judgment denies relief on both the complaint and cross-complaint. The *McLarand* plaintiff filed a complaint for breach of contract and the defendant filed a similar cross-complaint. The jury rendered general verdicts denying relief to both parties. The plaintiff and defendant both filed memoranda of costs under Code of Civil Procedure section 1032 and motions to tax costs sought by the other. The court awarded costs only to the defendant. Affirming the judgment, the court reasoned: "The phrase 'a defendant where neither the plaintiff nor the defendant obtains any relief' cannot be interpreted as [plaintiff] urges. A defendant cannot obtain relief unless it files a cross-complaint against the plaintiff because affirmative relief cannot be claimed in the answer. (§ 431.30, subd. (c).) The statute, therefore, already contemplates that when neither the plaintiff nor the defendant who has filed a cross-complaint prevails, the defendant is the prevailing party entitled to costs." (*McLarand, Vasquez & Partners, Inc. v. Downey Savings & Loan Assn., supra,* at p. 1454; see also *Schrader v. Neville* (1949) 34 Cal.2d 112; *Loughran v. Reynolds* (1945) 70 Cal.App.2d 241.)

We see no reason to depart from these well-reasoned precedents. McCoy relies on *Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1298, which allocated an award of costs for court reporter fees and jury fees among four defendants. The award of costs, however, is governed entirely by statute, and *Heppler* offers no authority for the interpretation of the language of Code of Civil Procedure section 1032, subdivision (a)(4), at issue here, i.e., "a defendant where neither plaintiff nor defendant obtains any relief."

B. Timeliness

McCoy argues that the second memorandum of costs was untimely because it was filed more than 15 days after mailing of the notice of entry of judgment as required by California Rules of Court, rule 870(a)(1). The record discloses that the notice of entry of judgment was mailed on March 3, 2004. The first memorandum of costs was filed 15 days later on March 18, 2004. Following a hearing, the trial court issued a minute order on May 4, 2004, that ordered Pack to submit an amended memorandum of costs eliminating his request for expert fees, allowed either party to submit supplemental briefing on the determination of the prevailing party, and provided that the matter would be deemed submitted on May 14, 2004. In accordance with the terms of the order, Pack submitted an amended memorandum of costs on May 10, 2004, within the time allowed by the trial court. In short, the record reveals that the allegedly untimely memorandum of costs was an amended memorandum, submitted on the order of the court, after a timely memorandum had been filed. We therefore find no error.

C. Defective Notice

Lastly, McCoy complains that he was not given timely notice of the minute order of May 4, 2004, and learned of the order through an online register of actions shortly before the deadline of May 14, 2004, for submitting further briefing. The record indeed reveals a certificate of service of the minute order filed on May 21, 2004, a date that supports McCoy's contention of belated notice. Nevertheless, we find no reason to believe that McCoy was prejudiced by the deficiency in notice. He filed a supplemental brief on May 14, 2004. He then filed a further motion to tax costs on May 21, 2004, and a reply brief challenging Pack's amended memorandum of costs on July 8, 2004. When the matter came up for a hearing on July 9, 2004, he had been afforded an opportunity to fully brief the issues and was heard on all his contentions. The trial court's order

following the hearing granted in part his motion to tax costs and reduced the award of costs to $6,491.85.

The judgment is affirmed.

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Swager, J.

We concur:

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Marchiano, P. J.

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Stein, J.